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Supreme Court, U.S.
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No. 01-1874

In the

Supreme Court of the United States

JUANA VARGAS-HARRISON,

Petitioner,

v.

RACINE UNIFIED SCHOOL DISTRICT, DENNIS McGOLDRICK, JOHN PELEJ, and PATRICIA STEPHENS-ROGERS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF

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ISSUE PRESENTED

Did the U.S. Seventh Circuit Court of Appeals corollary principle obviating the ***Pickering*** balance limit First Amendment freedoms secured under ***Pickering v. Board of Education***, *391 U.S. 563, 888 S.Ct. 1731, 20 L.Ed.2d 811 (1968)*?

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INTRODUCTION

Petitioner filed a Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit in this matter on June 24, 2001. The Respondents filed their Brief in Opposition to the Petition for Writ of Certiorari. This is the Petitioner's Reply to the Respondents' Brief in Opposition to the Petition for Writ of Certiorari.

ARGUMENT

I. THE U.S. SEVENTH CIRCUIT COURT OF APPEALS, THE DISTRICT COURT, AND THE RESPONDENTS SIMPLY MISAPPREHEND THE IMPORTANCE OF THE *PICKERING* BALANCING MANDATED BY THE U.S. SUPREME COURT.

A. There Should Have Been a *Pickering* Analysis.

Does the U.S. Seventh Circuit Court of Appeals corollary principle obviating the ***Pickering*** balancing limit First Amendment freedoms secured under ***Pickering v. Board of Education***, *391 U.S. 563, 888 S.Ct. 1731, 20 L.Ed.2d 811 (1968).* The Respondents describe Petitioner as the highest administrator of Gilbert Knapp Elementary School in Racine, Wisconsin. Like all Racine Principals, she was the "representative of the Board and the Superintendent" who "implements the curriculum approved by the Board." (Res. Brief p. 1).

They seek to characterize the Petitioner as being an individual who did not use the Knapp P-5 proposal as a vehicle to improve the District relations with the teachers and their union. "Rather than using their P-5 proposal as a vehicle to improve the teachers' relations with their Union, the Petitioner introduced a totally new and different program which dramatically shifted funds away from teachers'

positions." (Res. Brief p. 2, ¶ 3). They now assert that Petitioner would not accept her supervisors, subsequent direction to collaborate with Union officials, parents, and school community in development of a new proposal which did antagonize the union. (Res. Brief p. 2, ¶ 3 and p. 3, ¶ 1).

The District Court and the U.S. Seventh Circuit Court of Appeals minimized the Petitioner's predicament. What was also at stake was the effectiveness of the P-5 program and its impact and relationship to the students. What the Courts below focus soley on was the projected disruptions which may have occurred by Petitioner's speech and its potential impact upon the Union because of the loss of jobs and that there was an undermining of "the collaboration which the District was seeking to develop" with the Union. (Res. Brief p. 3, ¶ 2).

Judge Randa, in his District Court Decision, recognized that predicament. (Pet. App. 26a, ¶ 1).

> The Court has some sympathy for the plaintiff's predicament. On the one hand, she was required to exercise a "strong leadership role" in the development of the P-5 program. On the other, she had to please her superiors, including ultimately the elected school board, and, in the background, the union. Given the political power wielded by teachers' unions today, it took courage for Vargas-Harrison to say publicly, in advocating her views on the P-5 program, that is was "time to...stop the union running the school." Reynolds Op., p. 7. However, the subject matter of the disagreement between Vargas-Harrison and the defendants, so long as it was a matter "of public concern," is not all that important. The Court's First Amendment analysis would be the same if Vargas-Harrison had opposed her superiors (and the union, presuming that it took the same position) on sex education,

> prayer in the classroom, or the teaching of evolution. What matters is the nature of the plaintiff's job and whether it afforded her "meaningful input" into the formulation of the disputed policy. It is clear that Vargas-Harrison, by statute and regulation, held a position that authorized "meaningful input into government decisionmaking on issues where there [was] room for principled disagreement on goals or their implementation." ***Nekolny***, *653 F.2d at 1170.* Thus, even if the defendants did reassign or terminate Vargas-Harrison for opposing them (and the union) on the P-5 program, they did not violate her rights under the First Amendment. In other words, because Vargas-Harrison was a policymaking employee, her supervisors could, consistent with the First Amendment, fire her "for advocating positions in conflict with their stated policies." ***Warzon***, *60 F.3d at 1239.*

What the Respondent now asserts is that in the Petitioner's Statement of the Case is that the focus should be not on the Petitioner as Principal, but rather on her functions as its leader and spokesperson for the Superintendent and the Respondent School District as its highest manager.

The Respondents and the courts below concerned themselves with the functional impact and/or effect of Petitioner's speech on the relationships with the Union and the superiors. No where in their analysis is there any concern about the impact of her speech on the effectiveness of the P-5 program and its impact on the students. This is precisely why the ***Pickering*** balancing is the appropriate standard because the Court should not only weigh the impact and effects of the speech on the superiors and the Union, but it must weigh the importance of the speech on the P-5

program as it relates to the P-5 program's affect on the students. What if Petitioner was right in her assertions that the previous P-5 proposal had flaws and was detrimental to the students? Should she be punished for advocating the best approach for the students as the instructional leader of the school? Does Petitioner's speech relating to the effectiveness and impact of the P-5 program on students have any relationship or any importance in this analysis? The Seventh Circuit says implicitly it does not. (Pet. App. 13a, ¶ 1).

Assuming arguendo that the Respondents are correct, (however, the Petitioner does not concede this point), that Petitioner told the public meeting of the C&I Committee that the new proposal was flawed, offered copies of her own plan as a preferred alternative, and, thus, attacked both her superiors and her teachers (which she did not) actually happen. The court below still does not deal with the speech as it relates to a matter of public concern - that is, whether her speech concerning the improvement of the educational plight of low economic and disadvantaged students should be adequately debated. What the Seventh Circuit is saying, in effect, is that even if one is speaking on a sensitive issue, that is, the education plight of low economic minorities and disadvantaged students, if there are conflicts with Union harmony, then there is no free speech protection for the speaker. That is precisely why there is a need for the ***Pickering*** balancing.

B. All Other Circuits Followed *Pickering* Strictly.

In ***Lewis v. Cowen***, *165 F.3d 154*, the Second Circuit Court of Appeals applied the ***Pickering*** balancing test when the Plaintiff-Appellant (the employee) refused to follow the directive of his supervisor requiring that there be a modification in the Connecticut State Lottery. The directive was that the lottery games were going to be changed subject to the ultimate approval of the board. The Plaintiff-Appellant

disagreed with his superior. ***Lewis***, *165 F.3d at 158 and 159.* The Second Circuit indicated after a ***Pickering*** balancing that as a matter of law that the Defendant's interest in the effective and efficient operation of the division outweighed the Plaintiff-Appellant's First Amendment interests in refusing to present the proposed changes before the board in a positive manner. ***Lewis***, *165 F.3d 154 ¶ 24.* It is noteworthy that this was done by doing a ***Pickering*** balancing analysis.

In ***McEvoy v. Spencer***, *124 F.3d 92 (1997)*, Police Commissioner McEvoy "publicly and in house" expressed his opinion that the prior Commissioner had permitted excessive and unnecessary overtime payments to police officers and the Department had been grossly mismanaged. McEvoy was subsequently demoted following a previous election and then alleged that there was a conspiracy to demote him to Deputy Chief and that his First Amendment rights were violated. McEvoy indicates that:

> Where the evidence shows that the employer discharged a policy-maker solely for speaking out on a matter of public concern, and that the policy-maker's political beliefs played no role in the employer's decision, ***Elroy*** is inapplicable and ***Pickering*** must be applied, although how it should be applied remains for consideration.

McEvoy summarized the status of the law:

> In sum, although the Supreme Court has ruled that the policymaking status of an employee is relevant to the ***Pickering*** analysis, it has never stated that the discharged employee's position in the employment hierarchy would automatically tilt the ***Pickering*** balance in the employer's favor. ***McEvoy***, *124 F.3d 92 at 102.* We therefore read ***Pickering*** and its

progeny as holding that the policymaking status of the discharged or demoted employee is very significant in the ***Pickering*** balance, but not conclusive. That the nature of the employee's position is important to the free speech balancing test should not be surprising. Common sense tells us that the expressive activities of a highly placed supervisory, confidential, policymaking, or advisory employee will be more disruptive to the operation of the workplace than similar activity by a low level employee with little authority or discretion. *See, e.g.,* ***Bates v. Hunt****, 3 F.3d 374, 378 (11th Cir. 1993).*

The Second Circuit concluded that:

We now rule, consistent with our understanding of ***Pickering*** and ***Kaluczky***, that in a pure ***Pickering*** case, an employee's policymaking role does not provide an employer with complete insulation for adverse employment action, but does weigh, normally heavily, on the employer's side in the ***Pickering*** balance. ***McEvoy****, 124 F.3d 92, 103.*

What the Second Circuit did in ***McEvoy*** and in ***Lewis*** was that they never obviated the need for a ***Pickering*** analysis. The Seventh Circuit is the only Circuit which has obviated the need for a ***Pickering*** analysis.

C. The Debate Was Programing Versus Funding Allocation; It Was Not Political.

The late Judge Reynolds in his Decision and Order denying the Plaintiff's Motion for Preliminary Injunction (Pet. App. 34a) succinctly identifies the dispute in the proposal (Pet. App. 49a and 50a). Judge Reynolds suscinctly summarized the conclusion in denying the Preliminary Injunction:

> The balancing of interests weighs in favor of Vargas-Harrison. Vargas-Harrison, as principal, was given the responsibility to spearhead the P-5 proposal process under the P-5 Statute, and she had inside information on the needs of her school. Of course, the District was concerned that given Vargas-Harrison's opposition to the Union's P-5 proposal, and her alienation of the Union, she would not be able to effectively perform her duties at Knapp. But the District knew of Vargas-Harrison's efforts, and encouraged them, but did not stand behind Vargas-Harrison when she was opposed by the Union Director Ennis.

Moreover, Judge Reynolds did the balancing of harm and the public interest. With respect to the public interest, Judge Reynolds stated:

> The public interest lies on both sides of this dispute. Encouraging debate on important issues of school programming and funding...

Judge Reynolds correctly expressed the public interest. Judge Reynolds clearly summarizes the debate. (Pet. App. 37a)

> In Wisconsin, public education is financed by property taxes (nearly 40 percent), state aid (nearly 60 percent), and federal aid (less than five percent). The state has increased state aid dramatically in the past fifteen years, but to "control costs" (i.e., to prevent property taxes from going up), the state has placed a cap on amounts schools can spend, which amounts can be exceeded only by approval of a local referendum. In addition, the state has appropriated funds for P-5 programs, which funds go directly to school districts. The P-5 program funds can be used for jobs - which the teacher union wanted - or for other educational which Vargas-Harrison wanted. The fight over jobs (in this case, three) versus educational programs is what gave rise to the dispute between the parties. (Emphasis Added.)

> In the present case, Vargas-Harrison, believed (and said so) that Gilbert Knapp Elementary School's On-site Advisory Counsel was not established and did not function in accordance with the P-5 Statute and the directives of the State Superintendent of Public Instruction. The court finds that Vargas-Harrison was correct in this belief (although the correctness does not matter for present purposes) and was retaliated against for expressing her views. (Pet. App. 37a, ¶ 3; App. 38a).

As the instructional leader, the Petitioner focused on the effectiveness of the Program and its relationship to the students. Petitioner's speech may have interfered or antagonized the union. But for the antagonism, the plight of the students may have suffered.

CONCLUSION

The core principal case that the Seventh Circuit relied upon is ***Warzon***, which stands for the proposition:

> A policy-making employee can terminate an employee consistent with the First Amendment, fire her "for advocating positions in conflict with their stated policy. ***Warzon***, *60 F.3d 1239*. (Pet. App. 27a).

Judge Reynolds concluded, rightly, that there was a clearly identifiable policy in ***Warzon***. In the instant case:

> Neither party definitively explained what Defendants policy was and whether such a policy was stated within the meaning of the policy-making employee exception. (Pet. App. 71a, ¶ 1).

Moreover, there reliance upon ***Bonds v. Milwaukee County***, *207 F.3d 969 (2000)* is further expanded. At least, in ***Bonds***, the Seventh Circuit and the court below did a detailed analysis of ***Pickering***. In the instant case, there is no comprehensive analysis of ***Pickering***. The U.S. Supreme Court should determine the contours of ***Pickering*** and whether the expansion of ***Pickering*** by this decision and ***Bonds*** is warranted.

In the instant case, there was no ***Pickering*** balance. For this reason, Certiorari should be granted.

Respectfully submitted,

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